HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

THE POLICE POWER OF THE STATES AND THE FEDERAL POWER OF TAXATION. — Although the federal government cannot interfere with the internal police regulations of the states,[1] the states, on their part, must not in the exercise of their exclusive police powers obstruct the constitutional powers of the national government.[2] However, the line between these powers and the police powers reserved to the states under the Constitution, cannot be clearly defined. While, as a general rule, direct regulation of foreign and interstate commerce by the states has been held invalid,[3] incidental and reasonable restrictions, such as health laws and the like, have been sustained.[4] In the matter of patent rights, also, a similar distinction between direct [5] and incidental [6] burdens has been followed. Unlike the jurisdiction of Congress over patents and foreign and interstate commerce, which is potentially, if not actually exclusive,[7] the federal power of taxation is concurrent

[1] U. S. *v.* Dewitt, 9 Wall. (U. S.) 41; Barbier *v.* Connolly, 113 U. S. 27, 31.

[2] Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1; Henderson *v.* Mayor of New York, 92 U. S. 259.

[3] Railroad Co. *v.* Husen, 95 U. S. 465; Hall *v.* DeCuir, 95 U. S. 485. See 1 HARV. L. REV. 159; 4 *ibid.* 221; 10 *ibid.* 378.

[4] Morgan's S. S. Co. *v.* La. Board of Health, 118 U. S. 455; Mo., Kans., & Texas Ry. Co. *v.* Haber, 169 U. S. 613; Smith *v.* Alabama, 124 U. S. 465. See 2 HARV. L. REV. 267, 293; 11 *ibid.* 544; 22 *ibid.* 437.

[5] *In re* Sheffield, 64 Fed. 833; People *v.* Board of Assessors, 156 N. Y. 417. See 12 HARV. L. REV. 353. The same is true as to copyrights. People *v.* Roberts, 159 N. Y. 70.

[6] Allen *v.* Riley, 203 U. S. 347; Reeves *v.* Corning, 51 Fed. 774. See 20 HARV. L. REV. 333. State regulation of the use of the articles patented has uniformly been upheld. Webber *v.* Virginia, 103 U. S. 344.

[7] Where the subject of commerce is national in character or requires uniformity throughout the United States the power of Congress is actually exclusive. Cooley *v.* The Board of Wardens, 12 How. (U. S.) 299; Robbins *v.* Shelby County Taxing Dis-

with a similar power in the states.[8] Neither sovereignty, however, can tax the instrumentalities employed by the other in carrying into execution its constitutional powers.[9] Thus a state must not directly impede the collection of federal taxes.[10] But on the other hand, the federal government cannot by taxation interfere with the means used in a lawful exercise of the state police power.[11]

Concurrent regulation of the liquor traffic — on the part of the United States by an internal revenue license law which is in effect a tax, and on the part of the states by licenses and other police regulations — has brought these two jurisdictions into conflict. By an unbroken line of decisions the federal license gives no authority to carry on the liquor trade in the state, but is a mere receipt for a tax.[12] The regulation of the internal liquor traffic continues to be a matter exclusively within the police power of the states; and the most arbitrary and even confiscatory statutes have been upheld.[13] To aid in the better enforcement of local liquor laws, the states have attempted to utilize the evidence furnished by the federal license system. Thus it is uniformly held in the state courts that the payment of the federal tax and possession of the receipt therefor is *primâ facie* evidence of a violation of the state prohibitory law.[14] But the constitutionality of numerous statutes to this effect has not yet been tested.[15] Moreover, it has been held that a state court cannot compel the production by the federal collector of the United States records of returns and license payments.[16]

A statute in North Dakota provides that every person to whom a federal license is issued must publish notices of the same for three weeks in the newspapers, and after such period keep posted, along with the government tax receipt,[17] an affidavit of the fact of the publication and the obtaining of such license; and further, a duly authenticated copy of the tax receipt is required to be filed with a certain state officer, whose duty it is to publish monthly lists of such licenses. This statute has recently been held by the Supreme Court unconstitutional as an unreasonable burden on the federal power of taxation. *State of North Dakota* v. *Hanson*, 30 Sup. Ct. 179.

---

trict, 120 U. S. 489. But otherwise it is merely potentially exclusive until Congress acts. Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713; Nashville, etc. Ry. *v.* Alabama, 128 U. S. 96.

[8] Lane County *v.* Oregon, 7 Wall. (U. S.) 71, 77. See Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 198.

[9] M'Cullogh *v.* Maryland, 4 Wheat. (U. S.) 316; The Collector *v.* Day, 11 Wall. (U. S.) 113. See 19 HARV. L. REV. 286.

[10] U. S. *v.* Snyder, 149 U. S. 210; Palfrey *v.* City of Boston, 101 Mass. 329.

[11] Ambrosini *v.* U. S., 187 U. S. 1; U. S. *v.* Owens, 100 Fed. 70.

[12] License Tax Cases, 5 Wall. (U. S.) 462; Pervear *v.* The Common, 5 Wall. (U. S.) 475. A provision to this effect has now been incorporated in the internal revenue statute. U. S. Comp. Stat. (1901) § 3243.

[13] Mugler *v.* Kansas, 123 U. S. 623; Kidd *v.* Pearson, 128 U. S. 1.

[14] State *v.* Teahan, 50 Conn. 92; Fruide *v.* State, 66 Neb. 244. The fact of payment may be proved by the original records of the United States revenue collector (State *v.* Intoxicating Liquors, 44 Vt. 208; State *v.* Gorham, 65 Me. 270); or by a certified copy of these records (State *v.* White, 70 Vt. 225; State *v.* Howard, 91 Me. 396), or by other evidence (Common *v.* Brown, 124 Mass. 318).

[15] Common *v.* Uhrig, 146 Mass. 132; Guy *v.* State, 96 Md. 692.

[16] *In re* Weeks, 82 Fed. 729; *In re* Huttman, 70 Fed. 699. *Contra*, *In re* Hirsch, 74 Fed. 928.

[17] The United States statute requires all persons to keep posted the receipts denoting payment of the tax. U. S. COMP. STAT. (1901) § 3239.

As in the case of interstate commerce and of patent rights, whether the test applied be that of reasonableness or that of directness, the question is largely one of degree. A state statute requiring persons selling oleomargarine under a similar federal license to display signs to that effect on their wagons has been upheld.[18] On the other hand it has been held that liens securing payment of the United States internal revenue tax are not subject to state recording acts.[19] The statute in the present case imposes a burden on the person who pays the federal tax solely because of the payment of such tax and the posting of the license as required by the United States statute, irrespective of any user of such license within the jurisdiction. Hence there are no acts upon which the police power can rightfully operate, as was true in the oleomargarine case. On the contrary, the present statute is more closely analogous to the question involved in the lien case, since it is in form and substance a direct burden on the collection of federal taxes. Therefore, as an interference with the means employed by the national government in the exercise of its lawful power of taxation, it was rightly held unconstitutional.

ORIGINAL PROBATE OF FOREIGN WILLS. — Normally a will should be presented for primary probate at the testator's last domicile[1] regardless where it was executed or where the death occurred.[2] And at that place it is ordinarily the duty of the executor to offer the will for probate.[3] Reasons of convenience of proof, coupled with the fact that the settlement of the estate as well as the construction[4] and validity[5] of the will (except as to foreign realty)[6] are governed by the law of the domicile, make this practice desirable. Then, if necessary, ancillary probate or administration will be granted by those states and countries in which the deceased has left property.[7] It is not strictly necessary, however, that this order be followed. Since every sovereign has plenary power with respect to the administration of the estates of deceased persons situated within the jurisdiction, any

[18] Common *v.* Crane, 158 Mass. 218. A state may, under its police power, tax oleomargarine selling, though it is licensed by the federal government. Plumley *v.* Massachusetts, 155 U. S. 461.

[19] U. S. *v.* Snyder, *supra.*

[1] Mills *v.* Fogal, 4 Edw. Ch. (N. Y.) 559. See Stark *v.* Parker, 56 N. H. 481, 487. Similarly, in case of intestacy the primary administration is at the domicile. Stevens *v.* Gaylord, 11 Mass. 255, 262.

[2] Converse *v.* Starr, 23 Oh. St. 491.

[3] Mills *v.* Fogal, *supra;* Scripps *v.* Wayne Probate Judge, 131 Mich. 265.

[4] Harrison *v.* Nixon, 9 Pet. (U. S.) 483, 504 (personalty); Guerard *v.* Guerard, 73 Ga. 506 (realty); STORY, CONFLICTS, 8 ed., § 479 (*a*) (*h*). But if a change of domicile occurs, then the law of the domicile at the time the will was made governs. Atkinson *v.* Staigg, 13 R. I. 725; Staigg *v.* Atkinson, 144 Mass. 564.

[5] Moultrie *v.* Hunt, 23 N. Y. 394; STORY, CONFLICTS, 8 ed., §§ 465–473, 481. For statutes making probate in the domicile conclusive as to personalty, see 1 WOERNER, LAW OF ADMINISTRATION, 2 ed., 493.

[6] Robertson *v.* Pickrell, 109 U. S. 608; STORY, CONFLICTS, 8 ed., §§ 474, 483. As to realty, statutes in but few states make probate in the domicile conclusive. 1 WOERNER, LAW OF ADMINISTRATION, 2 ed., 494.

[7] For list of state statutes providing for ancillary probate or administration, see 1 WOERNER, LAW OF ADMINISTRATION, 2 ed., 493. Ancillary probate will be allowed even though the court in a prior original proceeding held the will invalid. Willett's Appeal, 50 Conn. 330; Succession of Gaines, 45 La. Ann. 1237.